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Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

OCTOBER TERM, 2001

LAWRENCE R. ROSANO,
beneficiary, donee,
Petitioner,

-v-

UNITED STATES OF AMERICA, AND
THE MERIT SYSTEMS PROTECTION BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LAWRENCE R. ROSANO, PRO SE,
1662 Lydia Avenue
Elmont, New York 11003
(516) 825-4949

69 pp

QUESTIONS PRESENTED

1. Although substantially different than the "clearly erroneous" definition, thereof, as applied in *Goehring v. Brophy,* 94 F.3d 1294, 1299-1300 (9th Cir. 1996), certiorari denied by this Court on March 31, 1997, here, in this petition, the precise and accurate definition of an unduly burden on the free exercise of religion under the Federal First Amendment to the United States Constitution is based upon *Sherbert v. Verner*, 374 U.S. 398 (1963), reaffirmed in *Thomas v. Review Board of the Indiana Employment Security Division et al* [hereinafter, known as "*Review Board*"], 450 U.S. 707 (1981), which moreover, Congress reaffirmed in 1993 its reliance on *Sherbert* by enacting the Restoration of Freedom of Religion Act ["RFRA"]. 42 U.S.C. 2000 bb(b)(1). Against this background, the first question presented here is:

> Whether the Internal Revenue Service ["I.R.S."] placed an unduly burden on the free exercise of religion upon "both beneficiaries, i.e., my brother, Robert, and myself, upon all donees, and upon my Mother, Mary Rosano, the donor, posthumously" [hereinafter, known as "the parties"], by ruling in 1993 that certain non-charitable gift checks for $10,000 or less per person per year which were issued before, yet cashed after, my Mother's death were not deductible from the gross estate for Estate Tax purposes, precisely, because my Mother "could have" revoked, even though, *in principle, only,* any or all of the non-charitable gift checks in question at any time prior to her death, which was due to terminal pancreatic cancer, during which time she issued all non-charitable gift checks in question.

2. Whether the burden of proof was rather on the United States-Defendant, thereby, requiring a retrial.

3. Whether the Merit Systems Protection Board has jurisdiction over ruling by IRS, and/or the Office of Personnel Management in context.

and/or the pattern of prohibited personnel practices governing a state civil case, and/or all past and current state criminal proceedings, and/or convictions, including the pending one, including stalking, and/or otherwise as indicated, herein, based on section 1206(h), as described in the Congressional Record-House, p. 33765, October 5, 1978 at A-26; or otherwise.

4. Whether the Merit Systems Protection Board has jurisdiction over the ruling by the IRS, and/or the Office of Personnel Management, both in context, pursuant to the MSPB decision on December 12, 1980, and/or the MSPB worksheet, demonstrating the fact that only 2 of 3 Board members decided it, by denying jurisdiction to review my appeal for termination in 1980.

5. Whether the petitioner is entitled to reasonable attorneys' fees and costs.

6. Whether the doctrine of Equitable Recoupment is applicable to gift check #179 for $20,000 to Washburn, as a matter of law and to determine the significance, thereof, to Petitioner.

7. Whether the beneficiaries are entitled to prevail on their estate gift tax deficiency refund, penalty, and interest, claim, inter alia, because they possessed a substantial adverse interest in the Estate of Mary Rosano, as a matter of law, at the time all non-charitable gift checks were issued before her death, under the IRS Rules, and/or otherwise regulations, included in 26 CFR 25.2514-3.

8. Whether United States District Court, Judge Johanna Seybert, and Magistrate Judge Orenstein. should have recused themselves under the circumstances, pursuant to *In Re Murchinson*, 349 U.S. 133, 136 (1955), upon which basis, retrial should be ordered on all cases.

9. Whether the New York State Nassau County Judicial Rules, which apply to criminal and/or civil court, are unconstitutional, per se, because they require the sitting judge to hear and decide whether he or she has subject matter jurisdiction; during the proceedings, and/or

after judgement; is a violation of *In Re Murchinson*, 349 U.S. 133, 136 (1955).

10. Whether this Court should review my justification defenses, as a matter of law, under New York State Public Law 35.05, and/or review all state decisions, both criminal and civil, including the pending hearing and/or trial by Judge John G. Marks, to determine whether each Court in question lacked subject matter jurisdiction, to convict me of a crime, and/or place a default judgement against me in 1993.

11. Whether each argument raised in this petition for a writ of certiorari to support the relation-back doctrine is necessary and sufficient to prove its validity, and was sabotaged by Congress.

12. Whether the petitioner and/or parties can sue the proposed defendant-attornies, either governmental or not, under New York State Judiciary Law 487 in a 1983 USC 42 lawsuit because liability is proven, as a matter of law.

elected or not

13. Whether any or all governmental officials responsible in any way for the governmental funding of abortion and contraception must be dismissed from governmental service, *ab initio*, for violating the free exercise clause to the federal first amendment under my precise and accurate definition of a burden on the free exercise of religion, as described, herein.

Attorneys

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PARTIES

The Petitioner is as follows: I am Lawrence R. Rosano, Pro Se, inter alia, a legal researcher who, also, created and developed all the legal arguments in this case. I am also a 50% beneficiary, donee, and taxpayer of one-half of the necessary tax to pay in order to entitled the estate to sue the U.S.A. in U.S. District Court.

In the U.S. District Court, I was a Plaintiff, Pro Se, initially, but denied Plaintiff status, nevertheless, precisely because the U.S. District Court, Judge Seybert, refused to recognize that I was a one half taxpayer, as indicated, above, yet, without giving me a reason for doing so during the litigation; however, as a pretext, issued a decision titled, *Lawrence R. Rosano v. United States*, 1999 WL 550313 (E.D.N.Y.), holding I would have had status as plaintiff if I had paid, at least, part of the tax required to sue in federal court, which, in fact, I did; yet, nevertheless, she failed to rule on my Plaintiff status as a donee; notwithstanding the I.R.S. lost the entire file from the 1993 I.R.S. audit, and I supplied all checks in evidence, including, but not limited to, the check which I paid one half of the estate tax needed, as indicated, above. I am a class representative under *Hackett v. McGuire Bros.*, 445 F.2d 442, 446-47 (3rd Cir. 1971) and I represent myself, my brother, the Executor, and all donees; and/or my Mother, posthumously; accordingly, and all similarly situated estates, as well. Subsequently, in the Second Circuit Court of Appeals, I was allowed only to be an amicus curiae, whereas my brother, Robert R. Rosano, the Executor, remained the Plaintiff, represented by Mr. A. Lawrence Washburn, Jr., Esq., as was done in the U.S. District Court. Carpenter, Bennett, & Morrissey was the law firm who prepared our 1995 IRS Memo, yet based on my legal research and development

The respondent is the United States of America, for the I.R.S., represented by U.S. Attorneys Mr. Berkowitz and Shapiro in U.S. District Court, and Betsy Erickson in the Second Circuit. The respondent is, also, the M.S.P.B. who denied jurisdiction to my appeal from a termination based on religious discrimination, as a probationary employee. *Rosano v. Dept. of Navy*, 699 F.2d 1315 (Fed. Cir. 1983).

LAWRENCE R. ROSANO,
beneficiary, donee,

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DECISIONS BELOW

The published decision by the United States District Court, Judge Seybert, Magistrate Judge Orenstein, denying the estate gift tax deficiency refund, penalty and interest, is cited as *Rosano v. United States*, 67 F.Supp.2d 113 [E.D.N.Y. 1999]; who also, in *Lawrence R. Rosano v. United States*, 1999 WL 550313 (E.D.N.Y.), erroneously, disqualified me as Plaintiff. On appeal, *Rosano v. United States*, 245 F.3d 212 [2nd Cir. 2001], decided in the Court of Appeals for the Second Circuit, affirms the denial of the estate gift tax deficiency refund, penalty and interest, and is included in A-1 to A-5. The Court of Appeals issued its decision on April 6, 2001. A Petition for Rehearing En Banc was made by Petitioner which was denied on August 3, 2001. On September 25, 2001, by letter, Justice Ginsburg extended the time to file my writ by 60 days, which brings the last date to file this petition for a writ of certiorari by December 31, 2001.

Rosano v. Dept. of the NAVY, 699 F.2d 1315 (Fed. Cir. 1983); *Rosano v. Secretary of the NAVY*, unreported decision, No. 83-6384 (9th Cir. 1984); *Rosano v. United States*, 9 Cl.Ct. 137 (1985).

JURISDICTION

Even as an amicus curiae, I had standing to present all of my arguments, based on a new legal theory on appeal under all the factual circumstances described in this case, not that I was not, also, entitled to Plaintiff status, besides. Note, *Olegario v. United States*, 629 F.2d 204, 216, n. 8 (2nd Cir. 1980), where the Second Circuit declared this:

> "*Green v. Brown*, 398 F.2d 1006, 1009 (2nd Cir. 1968), in which this court stated that 'we would not ordinarily be receptive to attempts to litigate issues not raised in the trial court,' .. The *Green* court acknowledged that this is not an absolute rule, a point recently reiterated in *Adato v. Kagan,* 599 F.2d 1111, 1116 (2nd Cir. 1979). Indeed, in *Green*, the SEC which had entered the case as amicus on appeal, was permitted to present a new legal theory to the appellate court. Like *Green*, this case involves an important federal issue.."

I am a class representative under *Hackett v. McGuire Bros.*, 445 F.2d 442, 446-47 (3rd Cir. 1971). Under *Allen v. McCurry*, 449 U.S. 90 (1980), I can raise issues which the criminal court is both unwilling, and/or incompetent under *Warren v. Byrne*, 699 F.2d 95, 98 (2nd Cir. 1983), to decide, such as, discrimination, and federal issues which criminal courts, in my case, have always demonstrated bad faith, precisely, by prosecuting me in a court which lacked subject matter jurisdiction, which since 1986, covers over 14 convictions, one money judgment in state civil court, and the pending state criminal malicious prosecution is in a court which lacks subject matter jurisdiction. Yet, in 1998 and 2000, Judge Seybert, the trial judge in this case, refused to remove these cases to her Court based on *Younger v. Harris*, 401 U.S. 37, 49-51, 91 S.Ct. 746 (1971) [holding that, absent a showing of bad faith by the prosecution, federal courts are to abstain from interfering with pending state criminal proceedings due to the important state interests implicated and the availability of review of constitutional claims in the state court]because she did not equate bad faith to a Court which prosecuted me without subject matter jurisdiction. But, because under these facts, and this pattern for over 15 years, even *Younger* held "It plainly appears that this course would not afford adequate

protection." *Id*, at 751.

Moreover, even though "to support the judgment of reversal on other grounds not passed on by the Court of Appeals ....., These grounds raise only issues of law not calling for examination or appraisal of evidence and we will consider them", *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 71 S.Ct. 259, 261 (1951). This Court has jurisdiction also under *Flast v. Cohen*, 392 U.S. 83 (1968), 8912 U.S.C. 5, and 28 U.S.C. section 1254(1) to review the judgement of the U. S. Court of Appeal. Also, under 7702(f) U.S.C. 5 at A-24, I can sue the M.S.P.B. because I timely filed, although against the wrong agency, concerning my unlawful termination in 1980. *Rosano v. United States*, 9 Cl.Ct. 137 (1985).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Federal First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In 1998, during litigation in U.S. District Court, the United

States notified the Plaintiffs that the I.R.S. lost the entire file on the Estate of Mary Rosano. Consequently, I exclusively supplied the entire evidence in the case at bar, such as the 1993 IRS Closing Letter, and copies of the front and back of each of the 58 non-charitable gift checks my Mother issued within one month before Sunday, January 21, 1990 when she died of terminal pancreatic cancer known to exist since November 30, 1989.

On and between December 29, 1989 and about January 8, 1990, my Mother issued these 58 non-charitable gift checks for $10,000 or less per person per year, as follows: 16 of them were issued by a bank, 42 issued by a Merrill Lynch Cash Management Account [hereafter, known as "CMA"]. The aggregate value of the these gifts amounted to over 25% of the gross Estate of Mary Rosano.

In 1992, the I.R.S. changed its regulations, by enacting 26 CFR 25.2511-1(g)(1), regarding non-charitable gift checks described, as follows: "First, the absence of donative intent does not prevent the imposition of the gift tax", 1999 Rutgers Law Review, p. 186, by Professor Mark R. Siegel. The legal effect of this IRS regulation, especially, on deathbed gift checks, has never been litigated until now.

In 1993, the I.R.S. audited the Estate of Mary Rosano. The IRS Closing Letter mentioned only 4 of the 16 bank checks, thereby, deducting from the gross estate the unmentioned 12 gift checks under Federal Rule of Evidence 803(6-7) at A-17. 2 of these 4 bank checks were 2-1989 Gallucci gift checks which were issued and deposited on December 29, 1989, and cleared on January 3, 1990. The IRS deducted this amount from the gross estate, but in 1990, when cashed, not in 1989 when issued and deposited, whereas the other 2-1990 Gallucci gift checks were cashed <u>after</u> my Mother's death, and yet, even the U.S. Attorney, Berkowitz, in U.S. District Court, conceded that the IRS "related back" these two checks to when issued.

The IRS also mentioned, summarily, all the CMA gift checks; except one of the 42 CMA non-charitable gift checks issued, #179, for $20,000, was issued to Mr. A. Lawrence Washburn, Jr., Esq., only the first $10,000 of which was deducted from the gross estate for Estate

Tax purposes. This was the only CMA check the IRS in 1993 related back as a gift.

In 1993, during the audit, I was unable to participate since I served a prison sentence of 96 days, after conviction in 1992, mysteriously, in a court without subject matter jurisdiction, on a charge trumped up by the Nassau County District Attorney, Denis Dillon, namely, for Obstruction of Governmental Administration, precisely, for not handing a female Police Officer my car keys when requested on a car stop for DWI, when, as a matter of fact, and health, I haven't taken a drink in over 30 years. After I was released on May 28, 1993, just days after the estate audit was completed, I met with the IRS auditors and vowed to fight our case in federal court, yet, only after I was unable to convince them of my position by raising some of my arguments presented here based on "plain and unambiguous" existing IRS regulation, and/or pertinent law, such as *Bacchus v. United States*, an unreported case (I). N.J. 1985. 57 A.F.T.R.2d 86-1519. 86-1 USTC par. 13,669), the U.C.C. argument, and 26 CR 25.2511-2(a) at A-18. Briefly, I argued that if the gift tax, and therefore, the gift tax deduction, attaches even though the donee "is not known or ascertainable", as stated in 26 CR 25.2511-2(a), then, the time that the gift tax exclusion is made occurs "when intended" which is exactly what *Bacchus* held, which I argued, again, in the Second Circuit in my September 5, 2000 Amicus Curiae memo at pages 13-14. Subsequently, the IRS agents never responded, but yelled at me.

In 1995, the Executor filed a memorandum prepared by a law firm, Carpenter, Bennet presented to the I.R.S. raising only several arguments, yet, all of which resulted from some of my legal reasoning, and legal arguments. The IRS never responded one way or the other.

In 1995, an appellate New York State Court decided *Pinasco v. Ara*, 219 A.D.2d 540, 631 N.Y.S.2d 346 (1995) holding for the first time that Merrill Lynch CMA checks were materially equivalent to bank checks to be treated, likewise.

In 1997, this 1995 IRS Memorandum was attached to the complaint filed in the U.S. District Court, Eastern District of New

York. In 1999, in her final decision, Judge Seybert overruled the entire 1995 IRS memorandum, allegedly, but, precisely, because the estate attorney, Mr. A. Lawrence Washburn, Jr., characterized our 1995 memo and, thereby, Plaintiffs position, as extending the law with my creative arguments, even though Washburn knew the contrary. *Rosano v. United States*, 67 F.Supp.2d 113, 116 [E.D.N.Y.]. In addition, Judge Seybert did not recognize me as a Plaintiff, even though I presented that I made a payment of one half the tax in order to sue in U.S. District Court; a point, as mentioned, before, Judge Seybert conceded that if only she had known, I would have been Plaintiff. *Lawrence R. Rosano v. United States*, 1999 WL 550313 (E.D.N.Y.). In 2001, in its final decision, the Second Circuit, also, never referred to any of our arguments included in our 1995 IRS memorandum, either, although that court allowed me to file an amicus curiae memorandum of 15 pages, although without exhibits attached.

ORAL ARGUMENT

On January 17, 2001, the Second Circuit allowed me to give one half the minutes at our oral argument, where and when I introduced for the first time on appeal my definition of the burden of the free exercise of religion, which is substantially different from that understood by the Second Circuit, not that the Ninth Circuit is any better. Specifically, I asserted that the IRS placed an unduly burden on the free exercise of religion upon the parties, when it ruled that all non-charitable gift checks cashed after my Mother's death could not be deducted from the gross estate for Estate Tax purposes, precisely, because my Mother "could have" revoked any or all of them before her death, even if, in principle, only. In response, Second Circuit Judge Newman erroneously corrected me by stating that the IRS did not rule that my Mother "would have" revoked, but, merely, that my Mother "could have" done so. In what remains as one of the crucial portions of this writ, then, immediately, thereafter, I rebutted Judge Newman's erroneous interpretation[1] of the burden, thereof, by affirming that

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[1]As a side point, there is no IRS-, or otherwise, regulation which indicates that the governmental benefits in question are unavailable if the donor "could have" revoked the gift checks, even if, principle only; however, certain case

"could have" was both the precise and accurate definition, thereof, pursuant to *Sherbert v. Verner*, 394 U.S. 398 (1963). However, neither Judge Newman nor the other panel judges ever allowed me to explain what might have remained nebulous, as far as their understanding of my precise and accurate definition of the burden. Against its clear precedent in *Green v. Brown,* 398 F.2d 1006 (2nd Cir. 1968), an amicus curiae, such as myself, has standing to present a new theory for the first time on appeal. I would have explained it further, beforehand, had I not been arrested for trespass on May 23rd, 2001, and subsequently, subjected to malicious prosecution which required me to represent myself, Pro Se, during the time I had to, also, prepare my Amicus Curiae memo which, consequently, disturbed my concentration to do so. This malicious prosecution, as were over the fourteen other arrests, most for trespass, since 1986, and a civil case, have all been held in a court without subject matter jurisdiction, no less. Nevertheless, perhaps, the Second Circuit panel did not need explanation, precisely, because they bought my arguments. In fact, under the Federal Rules of Evidence, the Second Circuit's silence was their own refutation, and this is one of the many arguments presented in this petition.

STATEMENT OF FACTS

In 1986, March, while preparing my Opening Brief, on appeal from *Rosano v. U.S.*, 9 Cl.Ct. 137 (1985), to the Federal Circuit Court of Appeals, working in the Library of Adelphi University where I had worked as an alumni on P.C. computers and doing legal research for the year before, I was arrested for allegedly trespassing, even though I possessed a valid ID card. I was arrested, thereafter in April, May and August, tortured by Adelphi University in concert with Garden City Police who looked the other way. My concentration was greatly disturbed and consequently, I lost my appeal. *Rosano v. U.S.*, 800 F.2d 1126 (Fed. Cir. 1986). I was arrested, again, twice in 1987 and once in 1988, with torture by Adelphi University Security Guards and Garden City Police at each arrest.

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law cites this as a rule, which, therefore, is "entirely judicially created", Id., 213, to the contrary of the Second Circuit.

Between 1987 and 1988, I was arrested while engaged in first amendment conduct four times and tortured, in similar fashion, on campus at St. John's University, Jamaica, Queens, New York, where on one arrest, I possessed an official ID card to take a personal computer course, but tortured and excluded, nevertheless. On another arrest, while attending noon day Mass in the Our Lady of Lords Chapel, a security guard, Mr. Carbonaro, grabbed my arm, even before Mass ended, and carried me outside where I was arrested, even though I caused no disturbance. In 1990 or 1991 I sued St. John's University in U.S. District Court, but unable to pursue it because bogged down with the lawsuit I had previously against Adelphi University. In 1990, March 10, just over a month after my Mother's death, due to investments I had made, I walked out of the Dime Savings Bank in Franklin Square, New York, with a cashier's check for $220,000. However, three days later, TSSG, Dreyfus informed me (petitioner) by Letter at A-25, dated in December, 1991, that the check I had cashed was, in fact, NSF, who made the ultimatum, therein, to either pay up money that TSSG/ Dreyfus alleged I kept, illegally, or else, Dreyfus would inform the IRS. I never paid TSSG/Dreyfus. To the contrary, I discovered as a matter of law, Dreyfus practiced illegal wire and bank transfers in concert with each other, illegally, so much so that I am entitled to millions of dollars as a result. In 1996, or thereabout, New York State Supreme Court held I was not entitled to money, but never decided, no less addressed, my argument that the civil court that issued the default judgement against me in 1993 lacked subject matter jurisdiction, which if my argument was upheld, I would recover money damages against all involved. Moreover, now, the illegal New York State Judicial Rules in criminal and civil court require the sitting judge to determine whether he/she had subject matter jurisdiction. Yet, this rule is unconstitutional, because if the judge held a lack of subject matter jurisdiction, liability would be self-created against this judge, thereby, giving the judge a stake in the outcome, a cause for recusal.

This issue was never raised before and I raise it here in this writ. This Court has held that "'[T]o perform its high function in the best way "justice must satisfy the appearance of justice"' *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942

(1955), *citing, Offutt v. U.S.*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954)." *Bilello v. Abbott Laboratories*, 825 F.Supp. 475, 478 (E.D.N.Y. 1993). Therefore, the judge in question deciding a case where he has a heavy stake in the outcome of that decision is, per se, prejudicial and may not hear and decide the case. *In re Murchison, supra*. In fact, currently, New York State District Court Judge John G. Marks, 99 Main Street, Hempstead, New York, ordered me to have a competency hearing[2], after I submitted to him a lot of legal memos and briefs necessary for my justification defense that I intend to raise in his court. However, currently, Judge Marks is also the judge presiding over my competency hearing that he ordered in the first place. In November, 2001 he refused to recuse himself. Yet, this prejudice, in different forms, has existed since 1986 when first arrested for criminal

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[2] Even though ten (10) months, before then, Judge Jaffe held that I was competent to stand trial and represent myself, Pro Se. There, Judge Kleiwer ordered the competency hearing, based on my statement to her in the court that "I did not understand the nature of the charges against me", precisely, because arrested 20 days after May 3, 2000, in a parking lot, open to the public, for trespass, whereas all my prior arrests were on premises I was accused of unlawfully trespassing, tortured, in part, for that purpose. Trespass conviction can not be had unless the order of exclusion is lawful. Here, *in addition to a lack of subject matter jurisdiction*, order of exclusion is unlawful because this retaliatory religious discrimination is basis for arrest on May 23, 2000, after Central High School officials perused leaflet I distributed to students leaving after school at sidewalk, since students gave the leaflet to school officials, verified by arresting Officer who showed me copy, thereof. Criminal Court refuses to transfer jurisdiction to decide this issue of religious discrimination to U.S. District Court under 1983 USC 42, pursuant to *Wanner v. Byrne, supra*, and, in turn, Judge Seybert denied my 1998 Removal Action when considering, inter alia, other similar convictions; and denied my 2000 Removal Action, inter alia, to remove this current criminal proceeding to her Court because of *Younger*. Yet, *Younger* presupposed state court bad faith was not present; whereas, if it was, even *Younger* held to remove, to her contrary. **NEVERTHELESS, Judge Seybert was prejudicial since** 1998 to decide our Estate case in 1999, **precisely, because** she reviewed my *March 10, 1990* TSSG/Dreyfus controversy, allegedly, cashing NSF check for $220,000, thereby, painting me as a NSF-check-scam con artist who only three months, before, made a similarly illegal "check-scam" of non-charitable gift checks my Mother, allegedly [?], issued on her deathbed, no less. If that's not prejudice, then, what is?

trespass while engaged in first amendment conduct on Adelphi University, thereby, abridging my Federal Right Petition, in addition, as follows:

In 1986, as mentioned, above, my four (4) arrests for criminal trespass while, exclusively, pursuing my federal case at Adelphi University cost me my appeal of *Rosano v. U.S.*, 9 Cl.Ct. 137 (1985) which was denied in 1986, and this Court denied cert in 1987, *Rosano v. U.S.*, 480 U.S. 907. Again, in 1997, April 15, I was excluded from Hofstra University, where I did all my legal research, similarly for 3 years before, but then, looking up and researching *Goehring v. Brophy, supra,* which this Court denied cert on March 31, 1997. I needed to point out this case to this Court since my legal reasoning, as here described, conflicted with it. I did get my writ in by May 15, 1997, but had to hire an attorney to do so, who had not enough time to include my Constitutional issues, namely, my justification defenses which was successfully made in U.S. District Court, 1993. Cert. was denied, too. Again, now, for the third time, on May 23, 2000, I was arrested for criminal trespass, and yet, now, also, stalking a 17 year old senior high school student back on May 3, 2000 when on Central High School property in Valley Stream, N.Y. Unable to contact her on May 3rd, between then, and the May 23rd arrest, I leafleted my legal memo and explanation, in part, made in this writ, engaged in first amendment conduct, informing high school students leaving school, the controversy of abortion coverage in group health insurance violates the federal first amendment as described in this writ. The criminal trial for that had been adjourned until January 8, 2002. Judge Marks refuses to consider that I am appealing a very important case in this Court, and refuses me to represent myself, Pro Se, which I want to do. Because this criminal case involves a federal first amendment challenge based on my legal discovery of the burden, thereof, I am unique, and as a class representative of Prolifers similarly situated, I and my class will be irrefutably harmed, since in this area, time is of the essence. The statute F.A.C.E. presupposes not to violate Federal First Amendment rights. Yet, to the contrary, F.A.C.E. is a bill of attainder under my legal reasoning. Yet, unless I rid myself of this malicious prosecution in every case held in a court without subject matter jurisdiction, I will have no justice. My past appeal, *Rosano v. Adelphi University*, makes

arguments I would raise here, except that I successfully raised a justification defense, in U.S. District Court, Judge Amon, 1993, under *Allen v. McCurry, supra*, yet, that Court never recognized it although I can argue it thoroughly, using the Federal Rules of Evidence, raised in this writ. This is what I would have included in my writ 1997, had I not been arrested on May 15, first excluded on April 15, 1997. In fact, in Nassau County District Court, before Judge John G. Marks, although I really believe, as a matter of law, it should be held in this Court, I intend to argue justification defenses under New York State Public Law 35.05 that had I not been excluded from Hofstra University Law School Law Library between April 15 and May 15, 1997, I would have prepared my own petition for a writ of certiorari in this Court and included my justification defenses, which were, judicially, ignored by both the United States District Court, Judge Carol Amon and the Second Circuit to, inter alia, outlaw abortion and contraception, per se, and/or as mandatory coverage in group health insurance. Briefly, under the fourth linchpin element of justification, *People v. Chachere*, 428 N.Y.S.2d 781 (D.Ct., 1st Dist. 1980), the District Attorney, or perhaps, more appropriately, the United States, would have to disprove beyond a reasonable doubt that this Court would have illegalized abortion and contraception, per se, and/or as mandatory coverage in group health insurance [and illegalize affirmative action], all per se, as raised originally, in *Rosano v. United States*, 9 Cl.Ct. 137 (1985).

Even though Judge Marks lacks subject matter jurisdiction, I'm still entitled to raise justification. *People v. McManus,* 505 N.Y.S.2d 43 (Ct.App. 1986); and thereby, in turn, in this Court, precisely, because the decision would have to go up to this Court, anyway, since it would conflict with a greater number of cases, than my definition of the free exercise of religion would. In fact, a justification defense, as a matter of law, must precede a trial, thereon. This Court should, therefore, at least, decide my justification defense, as a matter of law, but, even so, several courts have made decisions, in part, on it, and this Court should review the issue en toto. *Kiefer* allows this Court to do so, moreover.

REASONS FOR GRANTING THE WRIT

I.

IRS PLACED UNDULY BURDEN ON FREE EXERCISE OF RELIGION UPON ALL PARTIES BY RULING THAT MY MOTHER "COULD HAVE" REVOKED, EVEN IF, IN PRINCIPLE, ONLY, ANY OR ALL GIFT CHECKS IN QUESTION AT ANY TIME BEFORE HER DEATH, DUE TO HER TERMINAL ILLNESS, NO LESS.

On January 17, 2001, at oral argument before the Second Circuit panel, I - the Petitioner - accused the IRS in 1993, and thereafter, of placing an unduly burden on the free exercise of religion upon the parties because the ruling by the IRS [disqualifying the Estate of Mary Rosano from the gift-tax exclusion benefits (i.e., not deducting the value of the non-charitable gift checks in question from the gross estate for Estate Tax purposes), precisely, because my Mother "could have" revoked any or all of them at any time before her death, even if, in principle, only] forced the parties to choose between refusing to be willing to accept the remote possibility, even though *in principle, only*, to do what both the United States and the IRS were both prohibited to force the parties to do, namely, to violate our religious beliefs in practice by calling my Mother a liar, on her deathbed, no less, and consequently, nevertheless, forfeit the payment, both beneficiaries equally shared in paying, for the gift tax deficiency, penalty and interest, and my spending countless hours for years since the 1993 audit in legal research, and legal development, and countless hours in secretarial work, which caused, not only delay, but, interference in my life for the past 8 years, in order to create and maintain litigation, by pursuing the case at bar, in the public interest, no less, on the one hand, and be willing to accept the remote possibility to violate our religious beliefs, even though, *in principle, only*, as described, above, in order to, reluctantly, settle the estate, and accept work, on the other hand.

> "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship. [citing *Sherbert v. Verner*, 374 U.S. 398, 404(1963)]."

Thomas v. Review Board, 450 U.S. 707, 716-717 (1981).

First, as a practical matter, in order to establish a claim that a burden upon the free exercise of religion existed upon the parties to make liable the IRS for Constitutional violations, the petitioner must, first, prove that the governmental gift-tax exclusion benefits were always otherwise available to the estate. As a basis, note this:

> "More that 30 years ago, the Court held that a person may not be compelled to choose between the exercise of a First Amendment right and participation in an *otherwise available* (emphasis, added) public program."

Thomas v. Review Board, supra, at 716.

Secondly, and finally, the petitioner will prove that the IRS denied the parties these otherwise available governmental benefits in question by placing an unduly burden on the free exercise of religion, pursuant to *Sherbert v. Verner, supra.*

A. ARGUMENT FOR THE FIRST TIME ON APPEAL

On her deathbed, even though Judge Newman used it to the contrary, nevertheless, my Mother "could have" revoked any or all non-charitable gift checks in practice, no less in principle, only, as a matter of law, considering all non-charitable gift checks were, precisely and accurately, gifts causa mortis, which comment #3 to New York State UCC 4-405 at A-10 declares this: "This section ... is not intended to affect the validity of any gifts causa mortis or other transfer in contemplation of death,..."

> "The only differences between an *inter vivos* gift and one *causa mortis* are that in the latter (1) the gift must be made when the donor is apprehensive of death from some present illness or impending peril, (2) **it is revocable by the donor in (her) lifetime (emphasis, added)**, and (3) the gift is revoked in law if the donor does not die from such illness or peril (citations

omitted)."

First National Bank of Lockhaven v. Fitzpatrick, 29 A.D.2d 450, 289 N.Y.S.2d 314, 320 -321(4th Dept. 1968).

By observation, stating that my Mother "could have" revoked any gift check, *even if, in principle, only*, is identical to saying "(2) **it is revocable by the donor in (her) lifetime**", *Id.* Therefore, Judge Newman pretended that my Mother's gift checks were not gifts causa mortis, whereas, at oral argument, I plainly and unambiguously described that they were. In addition, also, in my Amicus Curiae Memorandum, on page 1-2, footnote #2, I included text and reference to the section on deathbed gift checks, as stated in Professor Barclay Clark's treatise, The Law Of Bank Deposits, at A-11 to A-16 which indicated the type of gift check at issue on appeal.

Yet, in order to set the record straight to be able to prosecute the governmental and non-governmental attorneys in question, under New York State Judiciary Law 487 at Appendix A-10, and sue them all in a civil action, no less, I included other necessary and sufficient arguments based on the Federal Rules of Evidence and otherwise.

OTHER ARGUMENTS BASED ON:

B. ORAL ARGUMENT

From another perspective, is the fact that whether "could have" or "would have", in context, as above described, precisely, defines a burden on the free exercise of religion is besides the point; namely, that it is clear, nevertheless, that Judge Newman, as a de facto defender of the IRS' ruling in question, presupposed that the governmental gift-tax exclusion benefits were always otherwise available, even though contrary to the Second Circuit's decision in *Rosano v. United States*, 245 F.3d 212 (2001) because Judge Newman implied "would have", in the context used, is a violation of the free exercise of religion under the Federal First Amendment, and, in turn, in saying so, the benefits had to be otherwise available, or else, he would not have said so.

Then, Judge Newman, nevertheless, concedes that the non-

charitable gift checks in question should have been deducted from the gross estate for Estate Tax purposes, as a matter of law, contrary to *Rosano v. United States, supra*, and therefore, Judge Newman's remarks were "against-interest".

Therefore, under Federal Rule of Evidence 801(d)(2)[3] at A-17, the Plaintiffs prevail in this case. Moreover, precisely, because a member of the Second Circuit, Judge Newman, made the remark, uncontroverted by his brother judges on the panel, no less, then, this substantial contrary evidence is what the Court really believed to be the law, not what the Second Circuit issued in *Rosano v. United States, supra,* which came after. What this really means is that the Second Circuit, judicially, created fraud upon its own Court.

C. AMICUS CURIAE MEMO NEVER REBUTTED.

Under Federal Rules of Evidence 803(6), -(7) at A-17, the absence of evidence by the Second Circuit in *Rosano v. United States, supra*, refuting any or all of my arguments raised in my Amicus Curiae Memorandum, which is considered a business record, is negative substantial evidence that the Second Circuit, as a matter of law, thereby, could not disprove any or all of my arguments raised, therein, in as much as *Green* imposed an obligation to do so under the circumstances. Consequently, all arguments, therein, are upheld; if not, also, because this Court should recognize, as a matter of law, that the proper burden of proof belonged on the United States, at least, as of

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[3]Federal Rule of Evidence, Rule 801 at Appendix A-17.

(d) Statements which are not hearsay

A statement is not hearsay if -

(2) Admission by party-opponent

The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency, or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

1995 [*Pinasco*] under the circumstances, as explained in answer II. The Second Circuit declared these statements, below, which presupposed that all averments, arguments and facts in my Amicus Curiae Memorandum were valid, as a matter of law, precisely, by what the Court did say, and what it did not.

(1) CA2: No case supports relation-back, cashed after death.

The Second Circuit, also, declared this at 245 F.3d, 213:

"The estate has pointed to no court that has allowed payment to relate back to the date of delivery if the donor was deceased on the date of actual payment and the donee was not a charitable entity." cf A-3 to A-4

(i) ***Smith v. Gentilotti***: Yet, to the contrary, first, I pointed in my amicus curiae memo at page 11, to the authority, *Smith v. Gentilotti*, 359 N.E.2d 953 (Sup. Jud. Mass. 1977)], holding that a $20,000 non-charitable gift checks, post dated, no less, issued before, yet deposited and cashed after donor's death, was excluded from the gross estate for Estate Tax purposes.

(ii) ***Rosano v. United States***: In the case at bar, as a matter of law, since 1995, all non-charitable gift checks cashed after my Mother's death related back, proven as follows:

As declared, above, 14 of 16 non-charitable bank gift checks related back to the date issued, even though cashed after, my Mother's death. In U.S. District Court, the U.S. Attorney, himself, Berkowitz, conceded that 2-1990 Gallucci gift checks related back. And, because 12 bank non-charitable gift checks were not mentioned in the 1993 IRS Closing Letter, this absence of evidence is substantial evidence that all these checks were deducted from the gross estate under Federal Rule of Evidence 803(6), -(7) at Appendix A-17.

(iii) ***Pinasco v. Ara***: Moreover, I raised the argument that after 1995, the United States did not reflect the changes in the law, pursuant to *Pinasco v. Ara*, 219 A.D.2d 540, 631 N.Y.S.2d 346 (1995)(also concluding that Merrill Lynch CMA checks were materially equivalent to bank checks). Thus, since 1995, the IRS did not equally apply "existing" case law [*Pinasco*] to relate back all CMA non-charitable gift checks, in a presumption of regularity, as it did, in a similar fashion, when the U.S. Attorney, Berkowitz, applied *Estate of Metzger v. Commissioner*, 100 T.C. 14 (1993); *Estate of Metzger v United States*, 38 F.3d 118 (4th Cir. 1994) to the 2-1989 Gallucci non-

charitable gift checks, thereby, relating them back, even though in the 1993 audit, the IRS, originally, did not. Yet, had it only done so, all non-charitable gift checks, both CMA and bank, cashed after my Mother's death should have been held to relate back under the IRS' own presumption of regularity[4].

(2) CA2: Relation-back doctrine is entirely judicially created.

CA2: No legislative authority. 4-4

"The doctrine of relation-back is entirely judicially created." *Rosano v. United States*, *supra*, 213. Yet, to the contrary, in my Amicus Curiae memo, at pages 1-3, I introduced a discussion for the first time ever in this area of estate law, New York State Uniform Commercial Code ["UCC"] 4-102 at A-8, which expresses the legislative intent to relate back non-charitable gift checks cashed after the donor's death under UCC 4-405 at A-8, which governs UCC 3-409 at Appendix A-8, which states that "A check .... does not .... operate as ... funds in the hands of the drawee." Therefore, had the Second Circuit only considered this argument in my amicus curiae memo, the Court would never have made the irresponsible remark, above, namely, that the relation back doctrine is "entirely judicially created", but the contrary is true, as proven, here. See Professor Barclay Clark's treatise, The Law of Bank Deposits, at A-11 to A-16.

(3) Unequal treatment between Charitable-, and Non Charitable-, and/or, between Bank-, and Merrill Lynch CMA-, gift checks.

In my Amicus Curiae Memorandum, I raised *Estate of Spiegel v. Commissioner* [CCH Dec. 16,898 (M)], 12 T.C. 524 (1949)(citing cases, here, omitted)[two charitable gift checks related back, one

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[4] *Abrahams v. NYS. Tax Comm'n*, 500 NYS 2d 965,967 (S.Ct. 1986) held this

> "There is a presumption of regularity with respect to government agencies in that it is presumed they 'act honestly and in accordance with the law and do nothing contrary to official duty requires to be done.' Fisch on Evidence, Section 1134 ..... petitioner (I.R.S./UNITED STATES, in this case, added) has failed to produce substantial competent evidence to the contrary (*Rocktime v. Finance Administrator*, 75 A.D.2d 526, 426 N.Y.S.2d 773 [1980]."

issued in the year before the year cashed, but before the donor died, and the other issued in the same year, but before, yet cashed after, the donor died, added], acq'd, 1949-2 C.B. 3. In my Amicus Memo, I proved that *Spiegel*, although ab silencio, related back a non-charitable gift check, that is, a *Bradley* tax payment check which *Spiegel*, constructively, held would relate back, even without consideration attached.

Conclusively, the related back doctrine does not discriminate between charitable and non-charitable gift checks. Alternatively, the Second Circuit did, but, had nothing to refute my arguments. Federal Rule of Evidence 803(7) at A-17. Therefore, the IRS, unlawfully, discriminated against donees, depending on whether issued by a bank or CMA. Therefore, had the Second Circuit merely reviewed my amicus curiae memo, the Court would never have made those careless remarks, as indicated, above, without, at least, refuting my arguments.

DEFINITION OF BURDEN ON FREE EXERCISE OF RELIGION

Outside the context of unemployment compensation benefits, even this Court has not applied the precise and accurate definition of the burden on the free exercise of religion under *Sherbert*, for example, when denying certiorari to *Goehring v. Brophy, supra*, in 1997. I developed my legal discovery, below, pursuing *Rosano v. United States*, 9 Cl.Ct. 137 (1985), in opposition to religiously offensive mandatory abortion and contraception coverage in group health insurance which I now can argue places a heavier burden on the free exercise of religion than petitioner in *Sherbert*, thereby, proving that the Ninth Circuit's decision in *Goehring* is "clearly erroneous". Moreover, the additional significance for my raising *Rosano* will become evident as this petition unfolds. Nevertheless, this Court in *Sherbert* should have held the following:

MY DEFINITION, AS PER *SHERBERT V. VERNER*

The ruling by the unemployment compensation benefits' board [disqualifying from benefits Mrs. Sherbert who was fired from her job because of her refusal to work on Saturday in violation of her Faith]

forces her to choose between refusing to be willing to accept the remote possibility, even though, in principle, only, to do what both her employer and the State were prohibited to force her to do, namely, violate religion in practice by working on Saturday, and consequently, forfeit benefits, on the one hand, and be willing to accept the remote possibility to work on Saturdays, although, in principle, only, as indicated, above, in order to accept work, on the other hand.

> "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship. [citing *Sherbert v. Verner*, 374 U.S. 398, 404(1963)]."

Thomas v. Review Board, supra, 716-717 (1981).

As applied to the case at bar, which I previously had made, my above definition of the burden on the free exercise of religion stands as the derivative definition. However, the case at bar is unique since the burden is much heavier because whether the parties refused or accepted the religiously offensive belief in question, we didn't have a choice to refuse to be willing to accept the possibility of violating religion. The one we chose, namely, to sue the United States, will change the IRS policy, namely, to violate the law, under the color of law to pretend, allegedly, "upholding" the law. This is the reason why Plaintiffs, the parties, and similarly situated estates, besides those in the case at bar, are entitled to sue under 1983 U.S.C. 42 in a civil rights action.

II. BURDEN OF PROOF ON DEFENDANT, NOT PLAINTIFFS.

Although the Second Circuit did not do so, I discussed in my Amicus Curiae Memorandum at page 6,7, that the burden of proof should have been on the United States-Defendant. Under Federal Rules of Evidence 803(7), that argument also is affirmed, as all others are. Under Federal Rules of Evidence 803(6-7), the Second Circuit conceded, as a matter of law, my argument on a shift of burden of proof, based on *Pinansco* and the fact that all non-charitable bank gift checks that were cashed after my Mother's death, related back to the

date when intended [14]. Therefore, it was incumbent on the United States to disprove with contrary substantial evidence that these non-charitable gift checks did not relate back. See the holding[5] in *Abrahams v. NYS. Tax Comm'n*, 500 NYS 2d 965,967 (S.Ct. 1986).

III.

APPEAL RIGHTS FOR CATEGORY OF INDIVIDUALS, ETC.

> **"Special Counsel investigations of a pattern of prohibited practices.**
>
> Under this paragraph, the Special Counsel would have authority to seek corrective action, and the Board is empowered to order such corrective action as it finds necessary. .....
>
> The Senate conference substitute in section 1206(h) adopts the Senate provision. .... The Senate bill makes it a prohibited personnel practice to grant any preference or advantage not authorized by law, rule, or regulation to any person for the purpose of improving or injuring the prospects of any particular individual of 'category of individuals'. The substitute **omits** this phrase **but it is expected** [emphasis, added] that a pattern of activities disadvantaging a category of individuals would be actionable under this subsection." p. 33765, Congressional Record-House, Oct. 5, 1978 at A-26.

Petitioner proposes that the interpretation of this section, above, allows any individuals, not only federal civil service employees, such as I was in 1979-1980, to raise a claim against the IRS concerning the relation back doctrine, as here presented, and/or the claim, made,

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[5]See footnote #4 on *Abrahams*.

here, also in this writ, that the old definition of the burden on the free exercise of religion was erroneous, as proven, here, and/or that the FHB program was unconstitutional; and/or, this individual in question could do so under 5 CFR 1201.56(b)(1),(2), -(3) at A-22,23.

IV. APPEAL RIGHTS FOR FEDERAL EMPLOYEES

Under the circumstances, I am entitled to raise, not only my definition, but my application of my definition, thereof, as an affirmative, under 5 CFR 1201.56(b) at A-22, A-23, based on this lawsuit, raised for the first time, namely, *Rosano v. Merit Systems Protection Board*, presented to this Court in this petition for a writ of certiorari.

In 1980, I was unlawfully terminated from federal employment as a civil engineer on probation for insubordination, yet, officially, for poor performance, based on conditions arising prior to my appointment, and subsequently, yet timely, filed my lawsuit, except with the wrong agency. Now, under 5 U.S.C. 7702(f) at A- 24, I can sue the Merit Systems Protection Board, the correct agency, to appeal its decision of December 12, 1980 at A-6, if not also, because only two of the three board members decided this decision, and moreover, referred to an amendment found no where in the record, thereby, making its decision "clearly erroneous", and therefore, consequently, always appealable; see the MSPB worksheet, at A-7. Jurisdiction lies in the U.S. Claims Court or U.S. District Court under 8912 U.S.C. 5 at A-24, *Rosano v. United States,* 9 Cl.Ct. 137 (1985); *AFL-CIO v. Devine*, 525 F.Supp. 250 (D.D.C. 1981)[The U.S. District Court and the U.S. Claims Court has jurisdiction to decider the constitutionality of including mandatory coverage for abortion in the Federal Employees' Health Insurance Premium Benefits program under 8912 U.S.C. 5.], inter alia, under 18 U.S.C. 241, as applicable.

In 1980, pursuant to a letter I received on May 23, one week before termination, I have MSPB jurisdiction because I was terminated in the seventh month of probation, whereas pertinent Naval regulations require termination to begin no earlier than the beginning of the ninth month, thereof. 5 CFR 315.806(c). Yet, I have never raised this

argument before. I had presented my entire argument for MSPB jurisdiction in my writ presented to this Court in 1987. See *Rosano v. United States, supra*; 800 F.2d 1126 (Fed. Cir. 1986); 480 U.S. 907, cert. denied (1987). See also, *Rosano v. Dept. of the NAVY*, 699 F.2d 1315 (1983)[jurisdiction denied on other grounds].

CONNECTION BETWEEN THE MSPB AND THE IRS.

The connection between my appeal of the MSPB decision at Appendix A-6, and the case at bar becomes evident when you consider that I claim that I was terminated in a constructive discharge from Base Camp Pendleton, California, Marine Corp., The Navy, based on religious discrimination, precisely, because I was constructively denied enrollment into a "Constitutional" Federal Employees' Health Insurance Premium Benefits' ["FHB"] program because all FHB policies included mandatory coverage for abortion and contraception. *Rosano v. United States, supra*, held at 144 that "There is no 'fair interpretation' that an employee can sue for money, absent a denial of enrollment or benefits under a plan".

By reason, if this Court held, as a matter of law, that mandatory coverage for abortion and contraception places an unduly burden on the free exercise of religion, pursuant to *Sherbert* , if not more so, then, all FHB policies I had to choose from on November 7, 1979, the third day of my employment, before being assigned my first job order to perform, were unconstitutional, and thereby, I was denied enrollment, thereby, entitled to press my claim in the U.S. Claims Court. Below, I prove that the FHB paced a heavier burden than that found in *Sherbert*, yet, contrary to *Goehring v. Brophy, supra.* Under 5 CFR 1201.56(b)(3) at A-22, A-23, if I proved that the FHB was unconstitutional, my termination would be overturned, and my rights would be thereby vindicated. See explanation of 5 CFR 1201.56(b) at A- 23.

Important for this case, however, under 5 CFR 1201.56(b), I can raise my definition, thereof, as an affirmative defense, and apply it to my unlawful termination from federal employment, and, also, raise my new definition of a burden, thereof, as applied to the case at bar,

also, as an affirmative defense, in context, as well. This is the reason why I included *Rosano v. MSPB* at this time to catch the power of MSPB jurisdiction, an argument for jurisdiction of which was never raised before, until now. Both cases involve an unduly burden on the free exercise of religion, although in a different form. Both involve "federal" law, the Constitution, no less. Both affect the entire nation, including governmental funding of abortion and contraception which makes the FHB issue that much greater. Nonetheless, precisely and accurately, defining exactly what an unduly burden on the free exercise of religion is affects every aspect of American Life, no less RFRA, enacted by Congress in 1993, which does not now define what a burden on the free exercise of religion is. See The Restoration of Religious Freedom Act (RFRA), 42 U.S.C. 2000bb-2 Definitions.

The gravamen of my claim for reinstatement of my former job at Camp Pendleton, California, where I was, unlawfully, terminated in what was a constructive discharge, is that the FHB placed an unduly burden on the Free Exercise of Religion to the Federal First Amendment, as follows:

The ruling by the Office of Personnel Management, Washington, D.C., notwithstanding any statute, such as, perhaps 5 U.S.C. 8902(f) [disqualifying from otherwise available non-offensive-to-religion FHB benefits, Lawrence R. Rosano because of his refusal to be willing to accept the always-available temptation to violate religion in practice] forced him to choose between refusing to be willing to accept the always-available temptation to do, what both his employer and the United States Government are prohibited to force him to do, namely, to violate religion in practice by procuring abortion and/or contraception; in order to be eligible to receive all non-offensive-to-religion FHB benefits in question, and consequently, forfeit joining the FHB program, altogether, on the one hand, and be willing to accept the always-available temptation to do so, as indicated, above, in order to accept federal employment, on the other hand.

In comparison, to the contrary of the holding in *Goehring*; the FHB places a much greater burden on the free exercise of religion than existed in *Sherbert*. Because, what Mrs. Sherbert was forced to be willing to accept the possibility to do, yet, *in principle, only*, Lawrence

Rosano was forced to be willing to accept the possibility to do in practice; which, by observation, is a heavier temptation to avoid, and therefore, presents a heavier burden to resist than if assured there is no possibility to do so in practice, as appeared in *Sherbert*. This Court mentioned in *Sherbert* that the government's doing so, even though in principle, only, conditions the religious adherent to violate religion.

> "A similar argument was made and rejected in *Sherbert*, however. It is true that, as in *Sherbert*, the Indiana law does not *compel* a violation of conscience. But, 'this is only the beginning, not the end, of our inquiry.' 374 U.S., at 403-404. In a variety of ways we have said that '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.' *Wisconsin v. Yoder*, 406 U.S., at 220, 92 S.Ct., at 1535. Cf. *Walz v. Tax Comm'n*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)."

Thomas v. Review Board, 450 U.S. 707, 717 (1981)

V.
PETITIONER IS ENTITLED TO REASONABLE ATTORNEYS' FEES, EVEN BEFORE THE CONCLUSION OF LITIGATION.

The Second Circuit, in effect, not only held to abridge my Federal First Amendment Right to Petition the Government for a Redress of Grievances, but, denied me the right to earn a living for the fruits of my labor, in the public interest, no less. The Second Circuit declared, as follows:

> "We address only appellant's argument that we should apply the doctrine of relation-back to gifts made to non-charitable donees where the donor has died prior to the payment of the gifts,"

Rosano v. United States, 245 F.3d 212, 213 (2nd Cir. 2001).

In 2000, as was done in our 1995 IRS Memo, I raised in my Amicus Curiae Memorandum on pages 7, 8 and 11, "pain and unambiguous" existing law, namely, *Bacchus v. United States*, *supra*, which followed *Estate of Spiegel v. Commissioner* [CCH Dec. 16,898

(M)], 12 T.C. 524 (1949)(citing cases, here, omitted)[two charitable gift checks related back, one issued in the year before the year cashed, but before the donor died, and the other issued in the same year, but before, yet cashed after, the donor died, added], acq'd, 1949-2 C.B. 3.

But, *Bacchus* is the law. Here's why: *Bacchus* was never appealed. Yet, had the Justice Department known that the U.S. District Court decided the related back doctrine, allegedly, erroneously, the U.S. Attorneys involved would have appealed *Bacchus*. At least, that is the presumption of regularity the Government follows, pursuant to *Abrahams*.

Moreover, as a governmental document, *Bacchus,* as I pointed out in my Amicus Curiae Memo on page 7, footnote #6, held this:

"No principled distinction can be drawn between these decisions and the issue presented here. The relation back doctrine squarely addresses both, and allows gifts [non-charitable gift checks, although all cashed prior to the donor-decedent's death, added] to be made deductible when intended, rather than when the check representing such gift is actually cashed - a matter beyond the donor's control."

Yet, in contrast, in 1987, the Tax Court criticized *Bacchus*, above, in *Estate of Gagliardi v. Commissioner*, 89 T.C. 1207, 1213, footnote #9, by declaring the following:

> "But see *Bacchus v. United States*, an unreported case (I). N.J. 1985. 57 A.F.T.R.2d 86-1519. 86-1 USTC par. 13,669)(extending relation back to noncharitable gifts without discussion of the distinction between charitable and noncharitable gifts)."

On analysis, though, a Tax Court has no jurisdiction, no less appellate jurisdiction, to review a decision by the U.S. District Court. Yet, arguendo, even if it had, *Abrahams* would hold *Bacchus* followed the law, which is a governmental document, no less. Therefore, under *Abrahams*, the *Gagliardi* Court could only challenge *Bacchus* by raising contrary substantial evidence of what the law is, but, certainly, not by raising its bald allegation that *Bacchus* was decided "without discussion of the distinction between charitable, and non-charitable,

gifts." Id., 1213. See *People v. Richetti*, 302 N.Y. 290, 97 N.E.2d 908, 912 (Ct.App. 1951).

Conclusively, under the Federal Rules of Evidence 803(6), -(7), the absence of evidence as to what was the distinction the *Gagliardi* Court had in mind, the *Gagliardi* decision is substantial evidence for the fact that there is no distinction, consistent with *Bacchus*. Moreover, this was especially important to me because, if based on "plain and unambiguous" existing law, then, under IRS regulations at A-18, I would be entitled to attorneys fees, even though as a non-lawyer, even though the award at that point was minimal compared to that claimed. Yet, I am entitled to even more of a legal fee.

> "Parties acting as private attorneys general should be reasonably compensated for their *vindication of the public policy* (emphasis, added) even if they themselves do not receive a large financial benefit.... It should not be expressed as a requirement that the fee award have a particular relationship to the amount of the monetary recovery."

Neece v. IRS, 94-2 USTC, paragraph 50,613, page 86,296.

Our 1995 IRS memorandum made another argument for a claim for my attorneys' fees. Yet, in addition, attorneys' fees should be granted to me, even tough I acted as an amicus curiae. See *Smith v. Fussenich*, 487 F.Supp. 628, 630 (D. Conn. 1980), citing "*United States v. Board of Education*, 605 F.2d 573, 576 (2nd Cir. 1979)["recognizing that the input from intervener and *amici curiae* can have significant value in achieving some of the benefits the parties sought in bringing suit."]. Moreover, I labored in the public interest, supplying what for over 38 years was lacking, not only in the area of religious freedom, but, as this case demonstrates, in the area of estate law, which will change the way the professionals handle the area of Estate Planning; according to Peter Corsentino, CPA.

In addition, in the Civil Rights area, I should be compensated for my legal development of the precise and accurate definition of *Sherbert*, even before a completion of the cases. See ironically, *Westside Woman's abortion clinic v. City of Cleveland*, 594 F.Supp.

though

299 (D. Ohio 1984) which held where non-attorneys were paid remuneration for years of litigation, achieving some success, even before the completion of litigation was over.

VI. EQUITABLE RECOUPMENT APPLIES TO GIFT CHECK #179

I was unable to present it because, although I was entitled to Plaintiff status, I was not recognized as a Plaintiff by the Second Circuit, in large amount, because my May 23rd, 2000 arrest and subsequent malicious prosecution upset my concentration, and thereby, was not permitted to file more pages that the 15 pages as amicus. Briefly, U.S. Attorney, Berkowitz, realized gift check #179 was treated by the IRS as a gift to Washburn, and the estate, therefore, paid gift tax on the $10,000 excess; but he argued that the $20,000 gift check was, rather, a constructive gift to me because Washburn did legal work for me, although doing so, Pro Bono, beforehand, at the time. Whereas, Washburn paid income tax on the same amount. The doctrine of equitable recoupment applies when taxes are paid on the same amount of money on two theories. *Kojes v. United States*, 36 F.R.D. 113, 115 (E.D.N.Y. 1964). Summary judgement never reflected the truth concerning gift check #179. This was a grave importance to me because, if a constrictive gift to me, and thereby, I constructively paid a legal fee to Washburn who was doing legal work on my trespass arrests and conviction, normally, I was not entitled to receive income tax deductions for Washburn's attorney fees. Yet, in 1993, in United States District Court, I, successfully, raised justification defenses to legitimized my conduct on campus at Adelphi University, pursuant to an order by trial judge Carol Amon, based on *Allen v. McCurry, supra*, overcoming the emergency to outlaw abortion and contraception coverage in group health insurance, and outlawing abortion and contraception, per se, if the Court would have recognized what actually was done at trial, namely, that I successfully raise justification defenses, per se, the legal proof of which is contained in my Memos in the Second Circuit in *Rosano v. Adelphi University.* I would be entitled to tax deductions for not only the $20,000 I constructively paid him, but for the larger amount of money I paid for criminal defense costs in attorneys fees since all those criminal cases supported the overturning of my unlawful termination in 1980 from federal civil

service, precisely, because the FHB was unconstitutional. This Court can decide this issue as a matter of law, which at this point is all it is.

VII. BENEFICIARIES' SUBSTANTIAL ADVERSE INTEREST ENTITLES THEM TO PREVAIL AS A MATTER OF LAW

This Court should hold, as a matter of law, that the beneficiaries had a substantial adverse interest, unique to all case law presented by defendant because the donor-decedent gifted away 25% of her estate, as indicated above, before she died which 25% does not include the gifts by check given to each beneficiary and Washburn, Esq. [#179 CMA] combined; as per IRS rules in 26 CFR 25.2514-3 at A-21, as raised in my Amicus Curiae memo on page 5 to page7.

WHY GRANT THIS WRIT

In summary, I never received my fair day in Court. Apparently, neither the IRS, nor the Courts, below, know the elements of a gift causa mortis. This Court should set the rule to do so. No statute defines exactly what a burden on the free exercise of religion is. For example, even RFRA {Restoration of Freedom of Religion Act] never did so under 42 U.S.C. 2000 bb-2, Definitions. Yet, by granting this petition for a writ, this Court should be surprised to find out that many of its prior applicable decisions on this subject of religious freedom, such as by denying certiorari in *Goehring v. Brophy, supra*, are "clearly erroneous" and must be either retried or overturned, or vacated, as the case may be. The American People deserve to find out all their Constitutional rights, whereas, now, for 38 years, in order to sue the government under the Free Exercise Clause to the Federal First Amendment, it appears to me that this Court hid the precise and accurate definition, thereof, to limit the religious freedom that *Sherbert* established in the first place.

For the first time in thirty eight (38) years since *Sherbert v. Verner, supra*, I have uncovered, as a matter of law, the precise and accurate definition of a burden on the free exercise of religion clause to the federal first amendment to the U.S. Constitution in order to, not only, precisely and accurately, apply the definition to other applications outside the context of unemployment compensation benefits, but in

order to compare the burden in question with others to ascertain the degree and type of burden, thereof, so helpful in deciding these cases.

As of now, without a precise and accurate definition, thereof, this discourages upholding Constitutional rights by (1) federal employees, such as I was in 1979, and unlawfully terminated in 1980, bound to follow The Code of Ethics For Government Service, and (2) the legislature. Yet, I dare say, now, the United States Supreme Court, owes it to the public interest to do so.

Next, this case is the first time any Court has reviewed New York State UCC 4-102, in context, applied to non-charitable gift checks for $10,000 per person per year when issued before, yet cashed after, the donor's death within the area of estate law. Doing so reverses the current, yet "clearly erroneous", case law by upholding the existing legislative intent under the circumstances; contrary to case law which has never considered it. The Courts have never considered IRS regulation 26 CFR 25.2511-2(a), either, which is a legislative intent that the IRS, in concert with estate, and estate planning, attorneys, are violating in the case at bar, as a policy under the color of the law.

In addition, the fact - absolutely unique to the facts as considered in all of the case law against the relation back doctrine, cited by Defendant-United States, and/or the Courts - is that my brother and I (Petitioner) held a substantial adverse interest, namely, over 25% of the total value of Mother's estate was donated as non-charitable gift checks, and issued out of a joint account between my brother, myself, and my Mother in the Merrill Lynch CMA account, considering 42 gift checks, and between my brother and my Mother in the bank account which only applied to the 4 Gallucci gift checks, as discussed. In addition, also, consider IRS regulation 26 CFR 25.2511-2(e) at A- 22 which implies the same. This Court has supervisory power to keep all lower courts' decisions consistent, but, by priority, first, consistent with the law, and then only, consistent with each other. Here, although the Courts seem consistent with each other, they are all wrong, as far as being consistent with the law. This raises, what to me for years appeared to be a "Catch 22" situation, where the State Court in Nassau County, in cahoots with the District Attorney, Denis Dillon, and/or Civil Court, violates federal Constitutional rights, based on

unconstitutional judicial rules which ensure corruption, applied to abridge my right to pursue justice in Federal Court, as is now the case, in this Court, and state criminal court.

CONCLUSION

For the foregoing reasons, the Petitioner is entitled to a new trial for his tax refund case, consistent with the final decision, raising, inter alia, equitable recoupment, after receiving the tax refund, penalty and interest, and my reasonable attorney's fees as a Pro Se non-attorney, besides that spent on attorneys. As a matter of law, all argument in my Amicus Curiae memorandum should be upheld, after deciding as a matter of law, that my definition of the burden on the free exercise of religion is the precise and accurate version, thereof, pursuant to *Sherbert*, and that the relation back doctrine applies, as well.

Also, this Court should remove my 1998 and 2000 Removal Actions, formerly filed in U.S. District Court to this Court, including the current criminal proceeding, in order to determine whether all courts lacked subject matter jurisdiction. This Court should set up rules for all lower Court's judicial rules, accordingly, to order the criminal court to decide discrimination cases under 1983 USC 42 in U.S. District Court, not local state criminal court, for the reasons, presented; order a new trial, pursuing civil rights claims of the parties under 42 U.S.C. section 1983 against Respondents IRS, etc.

Respectfully submitted,

LAWRENCE R. ROSANO, PRO SE,
1662 Lydia Avenue
Elmont, New York 11003
(516) 825-4949

Dated: Elmont, N.Y.
December 31, 2001